UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

ACE MASONRY, INC., d/b/a ACE UNLIMITED and BELLA MASONRY, LLC, alter egos

and Cases 3-CA-73540

3-CA-74523

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL NO. 3

and Cases 3–CA–73549

3-CA-74531

LABORERS INTERNATIONAL UNION, LOCAL NO. 785

and

NORTHEAST REGIONAL COUNCIL OF CARPENTERS

Case 3-CA-79606

Gregory Lehmann and Brie Kluytenaar, Esqs.

for the Acting General Counsel.

Jason B. Bailey and Edward J. Sheats, Esgs.

for the Respondents.

Richard D. Furlong, Esq.

for the Charging Parties (Bricklayers and Laborers Unions).

Curtiss Jameson, Esq.

for the Charging Party (Carpenters Union).

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Ithaca, New York from July 30 to August 3 and from September 11–13, 2012. The International Union of Bricklayers and Allied Craftworkers, Local No. 3 (the Bricklayers) filed the charge in Case 3–CA–73540 on February 1, 2012, and filed the charge in Case 3–CA–74523 on February 15, 2012 (with an amended charge in Case 3–CA–74523 filed on April 27, 2012). The Laborers International Union, Local No. 785 (the Laborers) filed the charge in Case 3–CA–73549 on February 1, 2012, and filed the charge in Case 3–CA–74531 on February 15, 2012 (with an amended charge in Case 3–CA–74531 filed on April 27, 2012). The Northeast Regional Council of Carpenters (the Carpenters) filed the charge in Case 3–CA–79606 on April 26, 2012. The Acting General Counsel issued a complaint covering the Bricklayers' and Laborers' cases on April 30, 2012, and then issued a consolidated amended complaint covering all five cases (including the Carpenters' case) on June 27, 2012.

The complaint alleges that between 2001 and 2011, Ace Masonry, d/b/a Ace Unlimited (Ace Masonry or Ace) agreed to be bound by a series of collective-bargaining agreements between the Bricklayers, Laborers and Carpenters unions and four associations¹ that represent their employer members in negotiating and administering collective-bargaining agreements. The complaint asserts that Bella Masonry, LLC (Bella Masonry or Bella) is a disguised continuation and alter ego of Ace, and further alleges that since on or about September 1, 2011, the Respondents have violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to apply the terms and conditions of the collective-bargaining agreements without the consent of the Unions, including but not limited to the contractual and fringe benefit provisions of the agreements. Finally, the complaint alleges that the Respondents violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide certain information that the Bricklayers and Laborers requested on January 13 and February 14, 2012 that is relevant and necessary for the Bricklayers and Laborers to perform their duties as the collective-bargaining representatives of the Bricklayers and Laborers bargaining units.

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Respondents Ace Masonry and Bella Masonry filed a timely answer denying each of the alleged violations in the consolidated amended complaint. On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Unions and the Respondents, I make the following

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FINDINGS OF FACT

I. JURISDICTION

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Ace Masonry is a corporation that has been engaged in the construction industry as a general contractor and as a masonry contractor, and previously maintained an office in Ithaca, New York. Bella Masonry is a limited liability company that has been engaged in the

¹ The four associations are: the Construction Industry Employers Association, Inc.; the Construction Industry Association of Rochester, New York, Inc.; the Southern Tier Association of Construction Contractors, Inc.; and the Contractors Association of the Southern Tier, Inc. (collectively, the Associations).

² The trial transcripts and exhibits generally are accurate, but I make the following transcript corrections to clarify the record: Transcript (Tr.) 1429, l. 18 should read "one of my lawyers advised me not to get involved"; Tr. 1553, l. 5 should read "sufficient indicia of reliability."

I also note that on November 13, 2012, I issued an order directing the parties to file corrected versions of certain exhibits to redact personal identifiable information, and to file exhibits that were inadvertently omitted from the electronic file. Pursuant to that order, the parties submitted the following corrected and/or additional exhibits: Acting General Counsel (GC) Exhs. 8, 17, 36, 38; Respondent (R.) Exhs. 12, 16–17. As appropriate, I have added these corrected or additional exhibits to my copy of the exhibit file, and I have removed any older versions of those exhibits that contained personal identifiable information. Since the electronic file still contains both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the exhibit files are updated and that any original exhibits that contain personal identifiable information are removed from the electronic files or otherwise secured to ensure confidentiality.

Finally, I note that although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

construction industry as a masonry contractor, and previously maintained an office in Burdett, New York. During the 12-month period ending on July 27, 2012, the Respondents provided services valued in excess of \$50,000 for Cornell University, State University of New York (SUNY) at Binghamton, and Ithaca College, entities directly engaged in interstate commerce. Based on those facts, I find that both Ace Masonry and Bella Masonry are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that at all material times for this case, the Bricklayers, Laborers and Carpenters have been labor organizations within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Ace Masonry – overview

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In May 2002, Lisa Bellavigna (Lisa) founded Ace Masonry, Inc. (Ace) as a masonry subcontractor based in Ithaca, New York. (Tr. 26–27, 1410–1411.) By 2006, Ace had grown significantly, and Lisa Bellavigna decided to begin taking on work as a general contractor. In connection with that change, Lisa Bellavigna changed the company name from Ace Masonry, Inc. to Ace Masonry, Inc., d/b/a Ace Unlimited. (Tr. 1144–1145; GC Exh. 23; CP Exh. 8.) Notwithstanding its expansion to general contracting, Ace continued to limit its field employees to carpenters, laborers and masons (Ace relied on subcontractors to provide workers in other skilled trades). (Tr. 239–242.)

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In 2011, 60 percent of Ace's work was as a general contractor, with the remaining 40 percent of Ace's work done as a masonry subcontractor. (Tr. 1145.) Ace primarily handled public projects (80 percent of its workload, with the remaining 20 percent being private projects), and focused almost exclusively on commercial (95 percent) rather than residential (5 percent) projects. (Tr. 1145.)

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2. Ace's history as a union contractor

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From its beginning, Ace operated as a union contractor, as it signed collective-bargaining agreements with the Bricklayers, Laborers and Carpenters unions that not only bound it to the terms of the agreements, but also any negotiated successor agreements unless Ace withdrew from the agreements in a manner consistent with the contract provisions (an exception that is not applicable here).³ (Tr. 61, 76–77, 247–248; GC Exhs. 4-6, 8–9, 11.)

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Since 2007, the Bricklayers union has served as the exclusive collective-bargaining representative of the following bargaining unit at Ace:

All employees performing work, as set forth in Article 1, Section 2 of the May 1, 2012 through April 30, 2017 collective-bargaining agreement between the Construction

³ The three unions in this case negotiated their collective-bargaining agreements with various employer/contractor associations serving the central and southern New York areas. Ace signed the agreements once they were finalized.

Industry Employers Association, Inc., the Construction Industry Association of Rochester, New York, Inc., the Southern Tier Association of Construction Contractors, Inc., association member employers, and independent employers, and the Bricklayers, within the geographic area set forth in Article 1, Section 3 of the same agreement.

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The Bricklayers union and Ace currently are parties to a collective-bargaining agreement that is effective from May 1, 2012, to April 30, 2017. (GC Exh. 41; see also GC Exhs. 7–9 (CBA covering May 1, 2007, to April 30, 2012).)

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Similarly, since 2002/2003, the Laborers union has served as the exclusive collectivebargaining representative of the following bargaining unit at Ace:

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All employees performing work, as set forth in Article 2, Section 2 of the June 1, 2011 through June 30, 2013 collective-bargaining agreement between the Contractors Association of the Southern Tier, Inc., the Southern Tier Association of Construction Contractors, Inc., and the Laborers, within the geographic area set forth in Article 2, Section 3 of the same agreement.

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The Laborers union and Ace are currently parties to a collective-bargaining agreement that is effective from July 1, 2011, to June 30, 2013. (GC Exh. 50; see also GC Exhs. 4–6, 45–48.)⁴

And, since 2002, the Carpenters union has served as the exclusive collective-bargaining representative of the following bargaining unit at Ace:

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All employees performing work, as set forth in Article 2, Section 1 of the June 1, 2011 through May 31, 2016 collective-bargaining agreement between "the Associations," representing the Construction Employers Association of Central New York, Inc., the Mohawk Valley Construction Employers Association, the Eastern Contractors Association, Inc., the Labor Relations Section of the Northern New York Builders Exchange, Inc., the Construction Industry Association of Rochester, New York, Inc., the Contractors Association of the Southern Tier, the Construction Industry Employers Association, the Southern Tier Association of Contractors, and The Building Industry Employers Association of Niagara County, New York, and the Carpenters, within the geographic area set forth in Article 3 of the same agreement.

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The Carpenters union and Ace are parties to a collective-bargaining agreement that is effective from June 1, 2011, to May 31, 2016. (GC Exh. 43; see also GC Exhs. 10–11, 42.)

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Consistent with the terms of its collective-bargaining agreements with the Bricklayers, Laborers and Carpenters unions, Ace has held itself out as a union contractor to potential customers, and at Ace's request has been featured in union newsletters that identify Ace as a union contractor. (Tr. 231–232, 244–245, 1135, 1183, 1261–1263; CP Exhs. 2, 4, 7; R. Exh. 15 at p. 9.) Further, Ace has consistently recognized its duty to pay its union employees wages and

⁴ Initially, Ace signed agreements with three different locals of the Laborers union (local numbers 7, 589 and 1358). (See GC Exhs. 4–6.) Those three locals subsequently consolidated to form Local No. 785. (GC Exh. 44.)

benefits and to collect union dues that are consistent with the amounts required in the collective-bargaining agreements. (Tr. 78–80, 83–85, 168–171, 238–239, 982, 1068–1072, 1266; GC Exhs. 12–20.) Ace (and Bella) have stipulated that Bricklayers, Laborers and Carpenters units are appropriate bargaining units for purposes of collective-bargaining within the meaning of Section 9(b) of the Act. (Tr. 250.)

B. Ace's Personnel

1. Lisa Bellavigna – Ace owner

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Lisa Bellavigna has served as the owner, director and president of Ace since 2002. (Tr. 26, 1139–1140.) Lisa Bellavigna was in charge of hiring all office personnel, and also handled matters related to Ace's finances, including bookkeeping, payroll, insurance and bonding, banking, accounts receivables, and accounts payables. (Tr. 42, 53, 1161–1163, 1165, 1408, 1676–1677.) Periodically, Lisa Bellavigna would communicate with Ace's project managers and superintendents about job costs and how jobs were progressing. (Tr. 570–571, 608, 754, 781–782.) Aside from the occasional exception, Lisa Bellavigna signed contracts and change orders on behalf of Ace. (Tr. 1028, 1158, 1160, 1401–1402.)

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2. Bob Bellavigna – Ace project coordinator

Since Lisa Bellavigna was new to the masonry industry when she founded Ace in 2002, she hired her husband, Bob Bellavigna, as a project coordinator and field supervisor that same year.⁶ (Tr. 33, 149–151, 154–155, 157, 282; GC Exh. 3.) In that capacity, Bob Bellavigna communicated with potential customers about new work, issued quotes, placed and supervised Ace's manpower in the field, communicated with and supervised Ace's project managers and superintendents about specific jobs in the field, and recommended employees for hire. (Tr. 32–33, 35, 37–38, 53, 163, 224–225, 300, 338, 341–342, 570, 818, 820, 1153, 1155, 1325; CP Exhs. 1, 10(A); GC Exh. 54.) In particular, Bob Bellavigna monitored Ace's masonry projects, since he himself was a mason and had approximately 30 years of experience with masonry work.⁷ (Tr. 162, 948–949, 1149, 1407–1408.) Bob Bellavigna also served as a backup to Lisa Bellavigna in some of Ace's dealings with banks and lenders, and thus had authority to sign checks and (as Lisa's husband) was a guarantor on some of Ace's loans. (Tr. 54, 264, 284–285, 825, 1272, 1461–1462.) Both union representatives and Ace's field employees viewed Bob Bellavigna as the point of contact for matters related to Ace's projects and field operations. (Tr. 570, 610, 753, 776–777, 822, 948, 984–985, 1032, 1047–1048, 1056, 1058–1059, 1084, 1097.)

⁵ On occasion, Lisa Bellavigna authorized Bob Bellavigna and Henry Bellavigna to sign change orders on behalf of Ace. (Tr. 1317, 1321–1323, 1327–1328, 1399–1400; 1544, 1578; CP Exhs. 10(D)–(E), 11–21.)

⁶ For similar reasons, Lisa Bellavigna also hired Dave Traver as an estimator in 2003. In 2004, Traver became a 45-percent owner of Ace (with Lisa Bellavigna owning the remaining 55 percent), and retained that status until he left the company in 2008. (Tr. 282, 284, 1140, 1142, 1144.) During his time with Ace, Traver assisted Lisa Bellavigna with learning the process of owning and managing a business, since he had prior experience in that area. (Tr. 282–283, 1409–1410.)

⁷ Starting in 2010 (approximately), Lisa Bellavigna relied on John Franzese to manage the projects that Ace handled as a general contractor. (Tr. 816, 1148–1150.)

3. Henry Bellavigna – Ace chief estimator and senior project manager

In 2004, Henry Bellavigna (Bob's Bellavigna's father; Lisa Bellavigna's father-in-law) joined Ace as chief estimator (for 80 percent of his time) and senior project manager (for 20 percent of his time). (Tr. 155, 161–162, 1155, 1157, 1576–1577; GC Exh. 23, p. 3.) Estimators predict the cost of a job before the project begins, to enable the contractor to submit a competitive but profitable bid. (Tr. 160, 320–321.) Project managers keep track of how specific jobs are progressing, coordinate the work of the various subcontractors at the worksite, participate in meetings to assign employees (including superintendents) to jobs, make recommendations to Lisa Bellavigna about potential new hires, and relay proposed changes to contracts (change orders) to the owner for consideration and approval.⁸ (Tr. 36, 321–322, 327–328, 331–332, 1096, 1158–1159.) Henry Bellavigna also took on the responsibility of preparing a brochure to advertise Ace's services. (Tr. 1156–1157.)

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4. Ace superintendents

Ace relied on its superintendents to manage its field projects. (Tr. 1141.) In particular, Ace expected its superintendents to keep track of time and costs on projects, order supplies and ensure that the necessary tools, equipment and manpower were available at the job site. (Tr. 1152, 1154, 1160, 1408–1409.) Superintendents also have authority to hire employees to work on their assigned projects, and may also discipline employees when necessary. (Tr. 36, 45, 219.) Ace's superintendents included: Randy Bell; Derek Hager; Steven Rollins; and Richard "Dick" Tracy. (Tr. 60–61, 1152, 1154; GC Exh. 3.) Superintendents reported to the project coordinators (Bob Bellavigna and John Franzese) about the scope of their assigned projects and the work schedule, and reported to Lisa Bellavigna about job costs. (Tr. 1153.)

5. Melissa Blanchard – Ace office manager

Melissa "Missy" Blanchard served as Lisa Bellavigna's office manager and "right-hand" assistant. Blanchard covered any office task that needed attention, including answering phones, ordering office supplies, maintaining Ace's website, filing, payroll, and processing the paperwork necessary for employee fringe benefits. (Tr. 59–60, 166–169, 635–636, 691–692, 1151–1152; see also GC Exhs. 13–15 (remittance forms for fringe benefits paid to Bricklayers, Carpenters and Laborers unions, many of which were signed by Blanchard on behalf of Ace).)

Blanchard would also order blueprints for jobs if one of the estimators asked her to do so. (Tr. 168.)

C. Summer 2011 – Ace's Financial Decline

By summer 2011, Ace was struggling financially due to the poor economy and a combination of contracts that caused Ace to lose money. (Tr. 278, 1167–1169.) In response, Ace began looking for additional people to buy into the Company. One potential group of buyers indicated that its interest in Ace was conditioned on Ace hiring a controller to manage

⁸ From time to time, Bob Bellavigna would serve as the estimator and/or as the project manager for Ace's projects. (Tr. 162–164.)

⁹ Project managers may also discipline employees. (Tr. 45.)

Ace's finances. Accordingly, in July 2011, Ace hired JaLynda Ashmall to serve as Ace's bookkeeper/controller (duties that were previously handled by Lisa Bellavigna). (Tr. 92–95, 1414–1415.)

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Meanwhile, Lisa Bellavigna fell into a state of depression, in large part due to the distress that she felt over Ace's financial decline. (Tr. 1169–1170, 1419.) Starting in approximately September 2011, Lisa Bellavigna reduced the amount of time that she spent at Ace, and determined that she wanted to get out of the contracting business altogether. (Tr. 124, 279, 281–282, 952, 965–966.) A variety of employees, including Bob Bellavigna and JaLynda Ashmall, stepped in to handle some of the duties that Lisa Bellavigna stopped taking care of because of her depression.¹⁰ (Tr. 124, 182, 215, 825–826, 952–954, 966–969, 1419–1420.)

Because of its financial problems, in 2011 Ace became delinquent with its payments to the Bricklayers', Laborers' and Carpenters' benefit funds. (Tr. 99–100, 105–106, 988–989, 1053.) Ace's financial problems and rumors that Ace was going bankrupt and was not keeping up with dues payments to the Unions caused some employee dissatisfaction, as some employees began looking for work with other employers, and in August 2011, several carpenters walked off of a job in progress at Corning, Inc.. ¹¹ (Tr. 280, 303–314, 685, 702, 1173, 1366–1367.)

D. Henry Bellavigna Starts Bella Masonry

On September 21, 2011, Henry Bellavigna established Bella Masonry, LLC as a masonry contractor because he was aware that Ace was failing and wanted to start his own company. (Tr. 347, 505; GC Exh. 32 at p. 11.) Henry Bellavigna was on Ace's payroll at the time, and remained on Ace's payroll until October 14, 2011. (GC Exh. 3.)

On or about October 14, 2011, Henry and Bob Bellavigna met with six to eight of Ace's employees in the warehouse near Bob Bellavigna's office at Ace.¹² Bob Bellavigna announced that Henry Bellavigna was starting Bella Masonry, and invited the employees at the meeting to consider working at Bella, particularly in light of Ace's mounting financial troubles. (Tr. 347, 353, 446, 465, 500, 502–503; see also GC Exh. 32 at p. 6.)¹³ The employees present at the meeting indicated that they would be interested in joining Bella. (Tr. 347–348, 351.)

Ace employees as a whole were well aware that Ace was having financial problems, not only because of Lisa Bellavigna's withdrawal from her work duties, but also because Lisa and Bob Bellavigna periodically advised management and employees about Ace's financial problems. (Tr. 960, 1171-1172.)

¹¹ There is no evidence that either the Bricklayers or the Laborers walked out on jobs that Ace was handling in the summer and fall of 2011. (Tr. 1370–1371, 1373.) As for the Carpenters' walkout at the Corning job, no one at Ace attempted to get those employees to return to work, and no one at Ace attempted to secure replacement workers. (Tr. 1367–1369.)

The following Ace employees attended the meeting with Henry Bellavigna: Randy Bell; Bob Bellavigna; Robert A. Bellavigna; Phil Bond; Derek Hager; Charles Morrow; Steve Rollins; and Dick Tracy. (Tr. 350, 500–501.)

Bob Bellavigna recalled participating in a meeting with employees and mentioning that Henry Bellavigna was starting a new company, but could not recall the exact nature of his remarks. (Tr. 920–922, 1504.) Henry Bellavigna also recalled the meeting, but gave conflicting testimony about whether he or Bob Bellavigna invited employees to consider working for Bella. (Compare Tr. 446, 465 with Tr. 347, 353, 1744–1745.) This conflicting testimony does not affect my analysis. However, I note that I have

By October 26, 2011, Bella had established its own website. (GC Exh. 27.) Bella's website, however, was virtually identical to Ace's website in design and content. For example, Bella's website included a letter from the president (Henry Bellavigna) that copied a letter from Ace's president (Lisa Bellavigna) nearly verbatim. (Compare GC Exh. 27 p. 1 with GC Exh. 23 p. 1 and CP Exh. 2 pp. 2–3.) Bella's website also listed Ace's clientele and references as its own, used several of Ace's employee photographs and biographies, and listed telephone numbers that previously belonged to Ace (but now were used by Bella). (Compare GC Exh. 27 with GC Exh. 23 and CP Exh. 5; see also Tr. 382, 524–525, 528–530, 584–587, 664–665, 765, 828–830, 841, 844, 995–996.) Notably, most of the employees that Bella listed on its website (Robert A. Bellavigna, Bob Bellavigna, Randy Bell, Derek Hager and Dick Tracy) were still on Ace's payroll as of October 26, 2011. (GC Exhs. 3, 27; see also Tr. 539–540, 772–773.)

E. Bella's Personnel

15 1. Henry Bellavigna

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Henry Bellavigna served as Bella's owner, president, senior project manager and chief estimator after he established the Company. (Tr. 1582; GC Exh. 27.) Running operations from his home in Burdett, New York, Henry Bellavigna was responsible for signing all contracts, change orders and submittals, and for handling Bella's insurance and banking transactions. (Tr. 483, 1426, 1582–1586.) In addition, Henry Bellavigna estimated jobs for Bella, oversaw and directed staffing for ongoing projects, and ensured that the necessary equipment was available for each project. (Tr. 342–345, 354–355, 577, 713.)

2. Bob Bellavigna

Bob Bellavigna served as Bella's project coordinator and field supervisor, ¹⁴ and officially joined Bella's payroll on December 12, 2011, at a wage rate of \$30 per hour (the same wage rate that he had at Ace). (GC Exhs. 3, 26, 32 (response number 23); R. Exh. 17.) However, Bob Bellavigna performed work for Bella well before December 2011, as in early fall 2011 he periodically assisted Bella with starting projects and with job quotes and bids. (Tr. 575, 729–732; GC Exh. 55; see also Tr. 545, 831 (by October 2011, Bob Bellavigna had promised to join Bella if Ace failed) and Section II(F)(3), (5) and (7), infra.)

As Bella's project coordinator, Bob Bellavigna managed Bella's employees working in the field, scheduled manpower, and ordered equipment and materials needed for ongoing projects. (Tr. 345, 357–358, 711–712, 723–726, 838.) Bob Bellavigna also oversaw ongoing projects, could hire and/or lay off employees after communicating with Henry Bellavigna about

given the most weight to Bella Masonry's position statement that Bob, rather than Henry, invited employees to consider working for Bella. (See GC Exh. 32 at p. 6.)

By November 14, 2011, Bella's website indicated that Bob Bellavigna's title was "VP Project Coordinator," instead of "Project Coordinator" as stated on the October 26, 2011 version of the website. (Compare GC Exh. 29 with GC Exh. 27.)

Bella's staffing needs, and occasionally assisted Henry Bellavigna with preparing estimates and job quotes. ¹⁵ (Tr. 344, 356, 712–713, 716, 721–722, 1425; GC Exh. 55.)

3. Melissa Blanchard

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After leaving Ace on October 19, 2011, Melissa Blanchard became Bella's office manager/coordinator on October 20, 2011, at a salary of \$15 per hour (the same wage that she earned at Ace). (Tr. 363, 553, 631, 688; GC Exhs. 3, 26.) As Bella's office manager, Blanchard took on similar duties that she handled at Ace, and thus was responsible for Bella's payroll, ¹⁶ accounts payable and receivable, taxes and billing. (Tr. 364, 555–556, 632, 639–640, 1587.) Blanchard also answered the telephone, ordered drawings and office supplies, maintained Bella's website and prepared job advertisements. (Tr. 555–556, 632, 653–654.) In short, as she did at Ace, Blanchard served as the right hand person to the owner at Bella. (Tr. 689.)

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Notwithstanding her departure from Ace to join Bella, Blanchard retained access to her Ace e-mail account. On November 29, 2011, Blanchard used her Ace e-mail account to obtain OSHA-10 cards from the Unions for two former Ace employees. Blanchard admitted that she obtained the cards for Ace, even though she worked for Bella at the time. (Tr. 705–707; CP Exh. 6.)

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4. Project managers and superintendents

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Robert A. Bellavigna first appeared on Bella's payroll on October 17, 2011, approximately three weeks before he left his position as a mason at Ace. (GC Exhs. 3, 26.) At Bella, Robert A. Bellavigna served as the vice president safety coordinator, a project coordinator, a project manager, and a mason/bricklayer. (Tr. 360, 362; GC Exh. 27.) As a project manager, Robert A. Bellavigna took the lead on the jobs that he was assigned, including managing the employees at his assigned worksites. (Tr. 361, 363.) As the safety coordinator, Robert A. Bellavigna ensured that staff were trained on safety procedures, and inspected worksites to ensure that safety requirements were being met. (Tr. 362.)

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Superintendents Randy Bell, Derek Hager and Dick Tracy filled out W-4 forms and joined Bella's payroll on October 17, 2011, two to four weeks before they left Ace. (GC Exh. 3; R. Exh. 17.) As with Ace, superintendents at Bella were responsible for coordinating and managing manpower at their assigned worksites. (Tr. 713, 723, 725.) Since Bella was a masonry subcontractor, its field staff was limited to employees who could work as masons, laborers or carpenters.¹⁷ (GC Exh. 32 (response number 23).)

Once in a while, Bob Bellavigna would actually perform masonry work in the field, but those instances account for at most five percent of his time at Bella. (Tr. 711–712.)

¹⁶ In connection with managing Bella's payroll, Blanchard used the software program "Foundation" to keep track of employee time and attendance. Blanchard also used Foundation when she worked for Ace and managed Ace's payroll. (Tr. 639–640.) Neither Blanchard nor Henry Bellavigna (Bella's first two office employees) installed the Foundation software on the computer in Bella's office. (Tr. 698–699.)

¹⁷ In October and November 2011, Bella hired the following former Ace employees for its field staff (not including superintendents): Philip Bond (mason); Robert Freelove (mason); Charles Morrow (carpenter); and Scott Smith (laborer). (GC Exh. 32 (response number 23).) Starting in November 2011,

Although Bella's superintendents began working for Bella in mid-October 2011, Henry Bellavigna did not set their wages until November 9, 2011, when he called them (and certain other employees)¹⁸ to a meeting at his home. (Tr. 694, 759, 1595.) At the meeting, the employees asked Henry Bellavigna if Bella would "go union" (i.e., be a union contractor), to which Henry Bellavigna responded that Bella might go union at some point, but not right then. (Tr. 581, 760, 1700.)

Bell, Bond, Hager, Morrow and Tracy then each signed a form that established their non-prevailing wage (the wage that they would earn when working for Bella on a private project that did not require union wages to be paid) and their prevailing wage (wages that Bella would pay employees when they worked on public projects where union rates were mandatory). (Tr. 487–488, 495–496; GC Exh. 35.) When fringe benefits were required, Bella promised to pay those directly to employees in a separate check from wages (instead of sending the benefits directly to the union hall, as a union contractor would do). (Tr. 580, 760, 1597–1598.)

F. Ace's Status in Fall 2011

Just as Bella was getting started, Ace was entering the final stages of its decline, primarily because it was not possible for Ace to survive financially, and because Lisa Bellavigna did not want to continue working as a construction contractor. (Tr. 972–973, 976–977, 1107; see also Section II(C), supra (discussing Lisa Bellavigna's desire to leave Ace).) Accordingly, Ace generally stopped bidding on new projects, and instead focused its efforts on closing out the projects that remained on its books. (Tr. 216–217, 854.)

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Ace's decline was not a secret, as both employees and union representatives were aware that Ace was struggling. (Tr. 685, 783, 1021, 1107.) Ace was having problems with its bank, and also faced audits and legal action by union benefit funds because Ace was significantly

Bella hired the following additional employees, none of whom had prior ties to Ace: Jason Dempsey; Joshua Freelove; David Howard; Brandon Marvin; and Doug Myles. (Tr. 1631–1632; GC Exhs. 3, 26.)

The meeting was attended by Henry Bellavigna, Robert A. Bellavigna, Randy Bell, Melissa Blanchard, Philip Bond, Derek Hager, Charles Morrow and Dick Tracy. (Tr. 692–693, 1595; GC Exh. 35.)

Henry Bellavigna admitted that while a non-union contractor in New York must pay employees the equivalent of union rates (including fringe benefits) when handling public projects, it can set its own wages when handling private projects. A union contractor, by contrast, must pay union rates for all projects (pursuant to the applicable collective-bargaining agreement), regardless of whether the project is public or private. (Tr. 495–496.)

The wage agreements that Bella had its employees sign capitalized on the flexibility that this framework affords to non-union contractors. For example, under the wage agreement, Bella promised to pay Randy Bell a prevailing (union) wage of \$43.73 (\$26.78 in wages plus \$16.95 in fringe benefits) for work performed on a public project, but promised to pay Randy Bell a non-prevailing wage of \$31.78 (with no fringe benefits) for work performed on a private project. (GC Exh. 35.)

Bella did not always follow through with its obligation to pay employees' fringe benefits, as Bella's payroll records indicate that certain employees were not paid fringe benefits despite working on public projects where such fringe benefit payments were required. (Tr. 1641–1645; GC Exh. 26 (employees Bell and Hager not paid fringe benefits on certain public projects).)

behind with its benefit payments.²¹ (Tr. 1093–1094, 1098, 1108, 1177; see also CP Exh. 9 (audits of Ace's payments to the Laborers' benefit funds).) Ace's workforce was also decreasing, as by October 1, Ace's workforce had dwindled to 19 employees (including supervisors), down from 52 only two months before.²² (GC Exh. 3.) Several key employees (such as superintendents Randy Bell, Derek Hager and Dick Tracy) remained loyal to Ace, however, and were available to continue working for Ace to assist the Company in closing out its remaining jobs. (Tr. 603, 786, 888–890, 893.)

G. Bella's Early Projects

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Most of Bella's initial contracting jobs were jobs that were related to Ace in some fashion (e.g., Ace signed the original contract, Bella used Ace employees, and/or Bella used Ace equipment).²³ The history of each of these contracting jobs is described below.

1. Trinity Episcopal Church

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On August 31, 2011, Ace signed a \$198,000 contract²⁴ to perform masonry and roofing work for Trinity Episcopal Church. (Tr. 127–128, 1198, 1201; R. Exh. 1-A.) On October 2, 2011, while Henry Bellavigna was still on Ace's payroll, Ace subcontracted the masonry work on the Trinity Episcopal Church contract (80% of the overall contract) to Bella for \$168,000.²⁵ (Tr. 128–129, 1201–1202, 1333–1334; R. Exh. 2; see also GC Exh. 3.) Ace did not solicit bids on the project from any other subcontractors or negotiate with Bella about the subcontract price before deciding to sign a subcontract with Bella.²⁶ (Tr. 174, 1335, 1338.) Instead, Lisa

²¹ Because of Ace's delinquency with its payments to the union benefit funds, on October 3, 2011, Bob Bellavigna resigned from his position as a member of the board of trustees for the Laborers' benefit funds to avoid a conflict of interest. (Tr. 808–809, 1092–1093; GC Exh. 39.)

During the trial, Lisa Bellavigna asserted that Ace's decline resulted from a lack of manpower that arose after certain employees received a letter (dated October 8, 2011) stating that: (a) the Bricklayers' benefit funds would not attempt to collect benefit payments from Ace for any hours that employees worked after October 1, 2011 (i.e., employees would be on their own if Ace failed to pay their benefits for any hours worked on or after October 1); and (b) employees' union membership would be "in violation" if they worked for Ace after October 20, 2011. (Tr. 280–281, 605–606, 784, 1178, 1373, 1375; R. Exh. 1.) I have not credited that explanation for Ace's decline because the record shows that most employees left Ace before the October 8 letter was sent, and the record also shows that the employees that remained with Ace after October 8 were willing to work for Ace despite the warnings conveyed in the October 8 letter. (Tr. 603, 606, 609, 611, 786, 888–890, 893, 1376–1378.) In addition, Bob Bellavigna admitted that Ace had to close its doors not because problems with manpower, but instead because Ace lost too much money on a few big jobs. (Tr. 973, 976–977.)

²³ Bella's records indicate that between September 1, 2011, and June 30, 2012, Bella performed only one additional job (T & M Alice Street) beyond the eight that I discuss below. (GC Exh. 26, pp. 18, 20.) There is no evidence that the Alice Street job was related to Ace in some fashion.

The contract price subsequently rose due to changes that Trinity Episcopal Church made (and Ace accepted) to the contract. (Tr. 1332–1333.)

On March 27, 2012, Ace subcontracted the roofing work on the Trinity Episcopal Church project to Charles Evans Roofing for the contract price of \$44,267. (Tr. 1201–1202, 1209–1210; R. Exh. 3.)

²⁶ Similarly, when Ace decided to hire a consultant in April 2012 to work on the Trinity Episcopal Church project, Ace hired Bella (which was already working on the project as the masonry subcontractor) as the consultant for the price of \$11,000. Ace did not solicit any bids for the consulting work before

Bellavigna informed Trinity Episcopal Church that she knew of a company (Bella) "that can perform just like Ace could perform," and then worked out the subcontract agreement with Henry Bellavigna/Bella. (Tr. 129–130.)

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When Ace agreed to subcontract work on the Trinity Episcopal Church project to Bella, Bella did not have any masons or other employees (besides Henry Bellavigna himself) on its payroll. Henry Bellavigna addressed this issue by inviting Ace's employees to speak with him if they were interested in working with him at Bella. (Tr. 1740, 1744–1745.) Bob Bellavigna, who also was still at Ace, assumed that the masons on Ace's payroll would join Henry Bellavigna at Bella to perform the work required at Trinity Episcopal Church. (Tr. 1515–1517.) Consistent with that understanding, Randy Bell and Robert A. Bellavigna began working for Bella on the Trinity Episcopal Church project on November 8 and 9, 2011 (respectively), shortly after their final days of work at Ace earlier in the same month. (GC Exhs. 3, 26.) Bella paid its employees the equivalent of union rates for their work on the Trinity Episcopal Church project, but sent employees a check for their fringe benefits instead of sending the fringe benefit payments to the Bricklayers, Laborers and Carpenters. (Tr. 404–405; GC Exh. 26.)

2. Ithaca Town Hall

On September 12, 2011, Ace agreed to serve as the masonry subcontractor for Hale Contracting, Inc., for the Ithaca Town Hall project. The contract price for Ace's services was \$67,304. (Tr. 1214–1215; R. Exh. 4.) Bob Bellavigna met with Town of Ithaca personnel at the pre-job meeting and identified himself as the project manager for Ace for the Ithaca Town Hall project. (Tr. 806.) Thereafter, Ace began its work on the project, using employees Randy Bell, Robert A. Bellavigna and Dick Tracy. (Tr. 452, 571, 801; GC Exh. 38.)

At some point after Ace began working on the Ithaca Town Hall project, Dick Tracy approached Bob Bellavigna and advised him that he (Tracy) was running out of work to do on the jobs that he was assigned and thus needed to know what project he should take on next. Bob Bellavigna told Tracy that if he wanted to, he could work on the Ithaca Town Hall project, but noted that the project was going to change from an Ace project to a Bella project. Tracy asked what he would be paid for his work on the project, and Bob Bellavigna assured him that he would be paid the same rate that he earned with Ace.²⁷ (Tr. 572–573, 588–589, 598.)

On or about October 18, 2011, Bella took over for Ace as the masonry subcontractor for the Ithaca Town Hall project.²⁸ (R. Exh. 6; GC 26.) As instructed, Tracy worked for Bella on

selecting Bella as the consultant. (Tr. 1346, 1350, 1445–1446; CP Exhs. 22–23.)

When asked about this exchange with Tracy, Bob Bellavigna testified that he did not remember the conversation. (Tr. 919.) Tracy's testimony on this point therefore stands unrebutted. (See also Tr. 589–591; GC Exh. 36 (testimony and documentation showing that Tracy subsequently split his time between Ace and Bella).)

It is undisputed that Bella took over for Ace as Hale's masonry subcontractor for the Ithaca Town Hall project. It is unclear, however, exactly what prompted Hale to make the change from Ace to Bella. Ace maintains that Hale terminated Ace for nonperformance. (Tr. 202–203, 1215.) I have not credited that explanation. First, I do not credit Lisa and Bob Bellavigna's testimony that Ace could not complete the Ithaca Town Hall project because it lacked sufficient manpower. (See Tr. 851–852, 1222.) There is no evidence that the Bricklayers, Laborers or Carpenters denied a request from Ace for additional

the Ithaca Town Hall project when he was not busy with Ace projects, and thus maintained a 40-hour work week after combining the hours that he worked for Ace and Bella. (Tr. 589–591; GC Exh. 36.) Similarly, Randy Bell, Robert A. Bellavigna, Philip Bond, Derek Hager²⁹ and Steven Rollins each worked for Bella on the Ithaca Town Hall project while they were also on Ace's payroll. (GC Exhs. 3, 26.) Dan Thaete, a civil engineer for the Town of Ithaca who was assigned to the Ithaca Town Hall project, did not observe a change in manpower during the project, notwithstanding Bella's arrival as the new masonry subcontractor.³⁰ (Tr. 800, 802.)

3. Vestal Hills

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In summer 2011, Bob Bellavigna met with superintendents Derek Hager and Dick Tracy in his office at Ace. At the meeting, Bob Bellavigna, Hager and Tracy reviewed blueprints for a project at Vestal Hills that Ace was going to handle in the coming months. (Tr. 755–756, 766–769.) Consistent with their usual practice, Bob Bellavigna, Hager and Tracy discussed the nature of the project, what materials would be needed, and how they would manage the project. (Tr. 767, 769.)

In early fall 2011, Hager and Bob Bellavigna met at the Vestal Hills site to see if Ace could begin working on the project, but determined that the worksite was too wet. Accordingly, the project was delayed.³¹ (Tr. 756, 795–796.)

On October 4, 2011, Bella agreed to serve as the masonry subcontractor for Pooler Enterprises, Inc. at the project at Vestal Hills, based on the terms of a scope of work and quote

manpower. (Tr. 853.) More to the point, the evidence shows that Bella was able to complete its work on the Ithaca Town Hall project by using employees that were on Ace's payroll. (Tr. 883, 893; GC Exhs. 3, 26.)

Second, although Ace presented a termination letter purportedly sent by Hale, I do not find the termination letter to be reliable, because it is not on Hale's letterhead, and no witness could testify that the letter was indeed signed by Steven Hale. (Tr. 1224–1225 (Lisa Bellavigna assumed the letter was signed by Steven Hale, but could not identify his signature independent from that assumption); R. Exh. 5.) Moreover, the termination letter was dated October 12, 2011, and by its terms gave Ace until October 22, 2012, to cure any defects in its performance. (R. Exh. 5.) Bella took over for Ace on October 18, 2012, without drawing an objection from Ace, which still had time to cure any alleged defects in its performance. (R. Exhs. 5–6.)

²⁹ Bella's records indicate that Derek Hager worked for Bella on the Ithaca Town Hall project for part of one day. (GC Exhs. 26, 38.) Hager testified, however, that he did not work on the Ithaca Town Hall project beyond (at most) stopping by to pick up tools. (Tr. 754–755.) I have credited Bella's records on this issue, and note that they are somewhat consistent with Hager's position that he briefly stopped by the Ithaca Town Hall worksite. In any event, this conflict in the record is not material to my analysis.

³⁰ Thaete did not discover that Bella replaced Ace as the masonry subcontractor on the Ithaca Town Hall project until he retrieved payroll documents pursuant to a subpoena served in this case. The certified payroll records show that both Ace and Bella performed work on the project. (Tr. 802, 804; GC Exh. 38.)

Lisa Bellavigna testified that Ace may have estimated a Vestal Hills project in 2010, but added that Ace never executed a contract for such a project. She also denied Ace having any role in Bella securing the Vestal Hills project/contract. (Tr. 1251.) I have given limited weight to Lisa Bellavigna's testimony on this point because it does not rebut the other evidence in the record about Ace's connection to the Vestal Hills project, and because many of the relevant events occurred when she was not fully engaged at the office.

that Bella submitted on September 28, 2011. (GC Exh. 33.) Bella's price quote to Pooler Enterprises included Bob Bellavigna's handwritten e-mail address as part of Bella's contact information. (Tr. 856–857; GC Exh. 33, p. 2.) Per the subcontract, Bella would be paid \$165,000 for its work on the project, with the work to begin on October 17, 2011 and be completed by November 11, 2011. (GC Exh. 33, p. 1.)

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On October 26, 2011, Bella began its work on the Vestal Hills project, using Philip Bond, Derek Hager, Charles Morrow, Steven Rollins, Scott Smith and Dick Tracy. Robert A. Bellavigna also worked at Vestal Hills, starting on October 31, 2011, and was assisted initially by Bob Bellavigna regarding how to set up the worksite. (Tr. 620, 731, 861, 896–897, 904; GC Exh. 26.) All of those employees were on Ace's payroll at the time.³² (GC Exh. 3.) In general, employees who worked for Bella at Vestal Hills met at Ace's office in the mornings, parked their personal vehicles at the Ace office, used Ace vehicles to ride to and from the Vestal Hills worksite,³³ and used a variety of Ace equipment (e.g., a forklift, grout pump, mixers, mud pans, planks, saws, scaffolding and stands) to perform their work at Vestal Hills.³⁴ (Tr. 578–579, 592–594, 619–620, 756–758, 996–997.) Hager observed that copies of the same Vestal Hills project blueprints that he reviewed with Bob Bellavigna in summer 2011 were available at the Vestal Hills worksite once Bella began working on the project in October 2011. (Tr. 769–770.)

4. Trumansburg Methodist Church

On October 17–19, 2011, Steven Rollins (masonry superintendent) and Scott Smith (laborer) worked for Bella on a project at Trumansburg Methodist Church. (GC Exh. 26.) Both Rollins and Smith were on Ace's payroll at the time, and used Ace equipment at the project. (Tr. 625, 1737; GC Exh. 3.) At the time of the Trumansburg Methodist Church project, Smith

³² Weeks later, the following additional Bella employees spent some time working on the Vestal Hills project: Randy Bell; Jason Dempsey; Joshua Freelove; Robert Freelove; David Howard; Brandon Marvin; and Douglas Myles. (GC Exh. 26.) None of that group of employees was working for Ace at the time. (See GC Exh. 3.)

³³ Ace permitted certain employees to sign out and use its vehicles, including Hager, who acknowledged that Ace permitted him to borrow an Ace vehicle when his personal vehicle was not running. (Tr. 782–783.) In the fall of 2011, the following employees (among others) were authorized to use Ace vehicles: Randy Bell; Bob Bellavigna; Henry Bellavigna; Robert Bellavigna; Derek Hager; Charles Morrow; Steven Rollins; and Dick Tracy. (R. Exh. 16.) The listed employees remained on the authorization list even after they left Ace and joined Bella. (Tr. 1256–1257.)

The record includes a rental agreement dated October 26, 2011, between Ace and Bella for the following equipment: Lull 644B-42 (a forklift); 6' x 6' pipe frames; X bracing; 6" x 6" feet; 20" outriggers; and mixer MMG-010. (R. Exh. 12; see also Tr. 206, 453.) Bella paid Ace \$4,690 for the equipment rental via check issued on March 27, 2012. (R. Exh. 12.) I have given some weight to this rental agreement and payment, but note that there is no evidence that Bella rented the Ace vehicles that it used to transport employees to and from the worksite, nor is there evidence that Bella rented the other Ace equipment that was used at Vestal Hills but is not listed on the rental agreement (e.g., grout pump, mud pans and saws). (Tr. 207.) Finally, there is no evidence that Ace rented equipment to any other company besides Bella. (Tr. 1363–1365.) I have not credited Henry Bellavigna's testimony that he rented other equipment from a private company (see Tr. 1625–1626), because that testimony is not corroborated by any documentation and is contradicted by the credible testimony of several witnesses that Bella indeed used Ace equipment at the Vestal Hills project beyond what was specified in the rental agreement.

believed that he was doing the project for Ace, since he had not been asked (and had not applied) to join Bella as an employee. (Tr. 616, 626.) In fact, Smith did not learn that he had worked for Bella on the Trumansburg Methodist Church project until he received a paycheck from Bella for his work on that project. (Tr. 625.)

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5. Wegmans

On October 18, 2011, Bob Bellavigna directed Dick Tracy to join him and Robert A. Bellavigna on a project at Wegmans to finish some concrete work. (Tr. 575–576.) Tracy met Bob Bellavigna at the Ace office and traveled with him to the Wegmans worksite. Although Tracy assumed that he was working on an Ace project, the project in fact belonged to Bella. Tracy assumed that he was working on an Ace project, the project in fact belonged to Bella. Bellavigna, and Tracy were each on Ace's payroll at the time. (GC Exh. 3.)

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6. Cornell

In October 2011, Bella bid on a small project at Cornell University that was limited to union contractors.³⁶ (Tr. 412–413, 504–505.) Since Bella was not a union contractor, it immediately handed the job off to Ace (which was a union contractor) to perform on a time and material basis (i.e., instead of having a price established via contract, at the end of the project Ace would submit an invoice to Bella for the time and material that it devoted to the project). (Tr. 134–138, 412–413, 418, 504–505.) Bella selected Ace for the Cornell project despite Henry Bellavigna's awareness of Ace's financial problems and Lisa Bellavigna's emotional distress, and without contacting other masonry subcontractors about handling the project. (Tr. 508.) Ace accordingly began working on the Cornell project on October 28, 2011, and completed its work on November 18, 2011 for the price of \$3,720. (GC Exh. 2.)

7. Chesapeake Athens

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Between November 21 and December 13, 2011, Randy Bell, Bob Bellavigna, Robert A. Bellavigna, Philip Bond, Robert Freelove, Derek Hager and Dick Tracy worked for Bella periodically on the Chesapeake Athens project. (Tr. 763; GC Exh. 26.) Bob Bellavigna was still on Ace's payroll at the time, and acknowledged that no arrangement was made to compensate Ace for the time that he spent assisting with one of Bella's projects. (Tr. 859, 916–918.)

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The employees assigned to the Chesapeake Athens project generally met at Ace's office, rode to and from the worksite in Ace vehicles, and used some of Ace's equipment (e.g.,

The Respondents point out in their posttrial brief that Tracy signed a W4 tax form for Bella on October 17, 2011, before he worked on the Wegmans project. (R. Exh. 17; see also R. Posttrial Br. at 7.) That fact, however, does not harm Tracy's credibility or show that he knew that the Wegmans project belonged to Bella. The evidentiary record shows that Tracy knew he would be working for Bella on the Ithaca Town Hall project in October 2011, because Bob Bellavigna gave him that information. (See FOF, Section II(G)(2), supra; see also GC Exh. 26 (Tracy began working for Bella at the Ithaca Town Hall project on October 18, 2011).) By contrast, there is no evidence that Bob Bellavigna (or anyone else) told Tracy that the Wegmans project also belonged to Bella.

³⁶ In Ace's records, this particular Cornell project is identified as "ECRF Cornell University." (Tr. 451; GC Exh. 3.)

scaffolding, a mixer, and a mudstand) to perform their work at the worksite. (Tr. 582–583, 617–618, 762, 860.)

8. SUNY Binghamton

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In late fall 2011, Lisa Bellavigna asked Henry Bellavigna if Bella could finish the "punch list"³⁷ for a masonry subcontracting job that Ace handled at SUNY Binghamton.³⁸ (Tr. 131–132.) Henry and Lisa Bellavigna agreed that Bella would take care of the punch list on a time and material basis. (Tr. 132, 1288–1289, 1619.) Ace did not check with other contractors to see if it could secure a better price than what Bella offered, and Ace did not inform SUNY Binghamton that Bella would be coming in to take care of the punch list. (Tr. 132–133, 310–311, 1362.)

Bella began working on the SUNY Binghamton project on or about December 13, 2011.³⁹ (GC Exh. 26.) On January 27, 2012, Bella sent Ace an invoice for the SUNY Binghamton project in the amount of \$20,524.84. Ace paid Bella the full invoice amount via check issued on March 27, 2012. (Tr. 1619–1620; R. Exh. 8.)

H. The Unions Learn About Bella

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In late October 2011, Bricklayers vice president Scott Stringer received a phone call from a union member to advise him that Bella had started working in the area. Stringer located Bella's website on the internet, and immediately contacted Bricklayers president Eugene Caccamise to let him know that there might be a problem with Ace and Bella. To address their concerns, Caccamise and Stringer contacted Bob Bellavigna to set up a meeting. (Tr. 990–991, 1037.)

At the meeting (held at Ace's office), Caccamise and Stringer and union representative Steve Harvey showed Bob Bellavigna a printout of Bella's website, and asked what Ace's intentions were and why Bella had been started as a non-union contractor using Ace's employees. (Tr. 992.) Bob Bellavigna advised Caccamise and Stringer that Ace had trouble competing for non-union residential jobs as a union contractor, and explained that he hoped Bella would enable him to get out of the financial hole that he had gotten into with Ace.⁴⁰ (Tr. 992–994, 1038, 1495–1496, 1498.) Caccamise responded that the Bricklayers could help Ace be

A punch list is a list of final tasks that must be completed at the end of a project, such as correcting minor imperfections in work or making other adjustments to meet the contract specifications. (Tr. 1617–1618.)

I do not credit Lisa Bellavigna's testimony that Ace could not finish the punch list on its own because it was out of manpower. (Tr. 178.) Although the size of Ace's staff had decreased by December 2011, there is no evidence that Ace contacted the Bricklayers, Laborers or Carpenters to request workers for the project. (Tr. 179.)

³⁹ In Bella's records, the SUNY Binghamton project is identified as "BSC Punchlist Masonry" or "BSC Punchlist T & M." (GC Exhs. 26, 32; see also Tr. 452.)

⁴⁰ Bob Bellavigna also testified about the meeting with Stringer, Caccamise and Harvey. Except for testimony that was corroborated by Stringer and/or Caccamise, I have not credited Bob Bellavigna's testimony about the content of the meeting because he had significant difficulty remembering details and distinguishing what was said in different meetings with union representatives. (Tr. 1449, 1456–1460.)

more competitive if Ace used the Bricklayers' residential rate or market recovery program, ⁴¹ but the meeting ended without an agreed resolution. (Tr. 1038–1040.)

I. December 2011 – Bank Seizes Ace's Assets

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At the end of December 2011, Ace's remaining employees left the company and Ace stopped its payroll. Ace also gathered and inventoried all of its equipment and tools and signed those items over to the bank. (Tr. 1180–1181, 1421–1422, 1538.) Thus, by December 31, 2011, Ace had no remaining hard assets. (Tr. 1181.)

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On January 9, 2012, Bella purchased an F-450 Ford truck from the bank (the truck was previously owned by Ace) for \$16,712.19. (Tr. 1608–1609; R. Exh. 14.) Later, on March 30, 2012, Bella purchased some of Ace's old tools and equipment from the bank for \$77,950. (Tr. 1606–1607; R. Exh. 13.)

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J. Information Requests to Ace and Bella

On January 13, 2012, the Bricklayers and Laborers sent an information request to Henry Bellavigna that asked multiple questions about Ace's and Bella's finances and the extent that Ace and Bella were connected to each other. (GC Exh. 21.) In the cover letter to the request, counsel for the Bricklayers and Laborers explained that he was investigating a claim that Ace was "operating a disguised continuance entity known as Bella Masonry, LLC." (GC Exh. 21; see also Tr. 1008–1009.)

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In an e-mail dated January 19, 2012, Bella (through counsel) responded that it would not be providing responses to the January 13, 2012 information request. In particular, Bella's counsel asserted that Bella "is owned and operated by different people with a different business address and different business accounts. Bella is not Ace." (GC Exh. 21.)

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In a letter to the Bricklayers and Laborers dated January 24, 2012, counsel for Bella asserted that Henry Bellavigna does not work for, and has never been an owner of, Ace. Counsel for Bella also maintained that Bella was in no way tied to Ace, and added that Bella "has no intention of becoming a signatory with your union." Bella's counsel concluded the letter by requesting that the Bricklayers and Laborers "stop contacting [Bella] concerning the provision of union labor." (GC Exh. 21; see also Tr. 1702.)

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Finally, on February 14, 2012, the Bricklayers and Laborers sent an information request to Lisa Bellavigna to ask questions about Ace's and Bella's finances and the extent that Ace and Bella were connected. (GC Exh. 21.) Once again, counsel for the Bricklayers and Laborers explained in the cover letter to the information request that he was investigating a claim that Ace was "operating a disguised continuance entity known as Bella Masonry, LLC." (GC Exh. 21; see also Tr. 1008–1009.)

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⁴¹ Under the residential rate program, the Bricklayers allow union contractors to submit bids based on a reduced rate for labor if they are competing against a non-union contractor for a desired project. (Tr. 994–995, 997–998, 1040–1041.)

Neither Ace nor Bella provided information in response to the January 13 and February 14, 2012 information requests sent by the Bricklayers and Laborers. (Tr. 491–492, 1008–1009, 1105–1106.)

DISCUSSION AND ANALYSIS

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A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-ornothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

My credibility findings in this case are generally set forth in the Findings of Fact above. However, my overall observation during trial was that the Acting General Counsel's witnesses were largely credible in their testimony, particularly regarding the work that they performed for Ace and Bella. Much of their testimony was unrebutted, or alternatively was corroborated by documentation and/or the testimony of Bob, Lisa or Henry Bellavigna.

Lisa Bellavigna was partially credible. I credited much of her testimony about Ace's decline and the effect that Ace's decline had on her emotional health, but I have given less weight to her testimony that Ace had trouble securing manpower in 2011, primarily because her testimony on that issue was speculative and not based on her first hand knowledge.

I did not credit significant portions of Bob Bellavigna's testimony. Bob Bellavigna was a particularly difficult witness insofar as he was often evasive when responding to questions, including questions that merely related to background facts that were not controversial. He also demonstrated poor recall for details about conversations or other pivotal events, and thus did not rebut testimony that other witnesses provided about those conversations. Bob Bellavigna was credible when he testified about the challenges that he faced when Lisa Bellavigna's mental condition declined, and I have therefore credited that limited aspect of Bob Bellavigna's testimony.

Finally, Henry Bellavigna's testimony was also only partially credible. He frequently provided testimony that conflicted with Ace's and Bella's own business records, and struggled with his testimony when confronted with those inconsistencies. In those instances, I generally have credited the information set forth in Ace's and Bella's records, since no credible evidence was offered to show that the records were unreliable.

B. Was Bob Bellavigna a Supervisor for Ace and Bella?

Although the parties reached some stipulations about preliminary matters before and during the trial, the parties did not reach a stipulation about whether Bob Bellavigna was a supervisor for Ace and Bella within the meaning of the Act. Section 2(11) of the Act defines "supervisor" as:

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any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Under this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and (3) their authority is held "in the interest of the employer." Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

I find that the Acting General Counsel demonstrated that Bob Bellavigna was a supervisor for both Ace and Bella during the relevant time period. As the project coordinator for Ace, Bob Bellavigna had significant authority over employees, and in fact was described as Ace's field supervisor. In that role, Bob Bellavigna served as the manager for all of Ace's field employees, and thus had the authority to (among other things) hire employees, assign them to jobs, and direct their work at specific job sites. Bob Bellavigna used his independent judgment and discretion (informed by his years of experience with masonry) when exercising his authority, as (for example) he could choose which employees to assign to particular jobs, and could also choose to reassign employees to different jobs depending on his assessment of Ace's interests and Ace's overall staffing needs in the field. (Findings of Fact (FOF), Section II(B)(2).)

When Bella began operating in September 2011, Bob Bellavigna assumed the role of its project coordinator and field supervisor immediately, even though he did not officially leave Ace and join Bella's payroll until December 2011. In essence, Bob Bellavigna wore two hats once Bella started, as he used his position as Ace's project coordinator to facilitate his new role as Bella's project coordinator. In that dual capacity, Bob Bellavigna assigned Ace employees (occasionally without their knowledge) to Bella projects, and directed employees in their work for Bella, particularly when projects were in their initial stages. Finally, as with Ace, Bob Bellavigna used his discretion and independent judgment when assigning employees to Bella jobs, as he selected the employees that he desired for each job, and could choose to redirect employees as needed to serve Bella's interests. (FOF, Section II(E)(2), (G)(2), (3), (5) and (7).)

⁴² Consistent with Bob Bellavigna's actions that demonstrate that he was a supervisor for Bella, Bella identified Bob Bellavigna as its project coordinator on its website as early as October 26, 2011, well before Bob Bellavigna officially left Ace and joined Bella. (FOF, Section II(D).)

Since the evidence demonstrates that Bob Bellavigna was indeed a supervisor for both Ace and Bella (and indeed both Ace and Bella described him as a field supervisor, see Tr. 33 and GC Exh. 32 (response number 23)), I have viewed his statements and actions in that light in reaching my decision in this case.⁴³

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C. Were Ace Masonry and Bella Masonry Alter Egos?

When the General Counsel alleges that an entity is the alter ego of a respondent, subject to the latter's legal and contractual obligations, the General Counsel has the burden of establishing that status. *U.S. Reinforcing, Inc.*, 350 NLRB 404, 404 (2007). The determination of alter ego status is a question of fact for the Board, resolved by an examination of all of the attendant circumstances. Id.

The Board generally will find an alter ego relationship when two entities have substantially identical ownership,⁴⁴ management, business purposes, operations, equipment, customers and supervision. Not all of these indicia need be present, and no one of them is a prerequisite to finding an alter ego relationship. Unlawful motivation is not a necessary element of an alter ego finding, but the Board also considers whether the purpose behind the creation of the suspected alter ego was to evade responsibilities under the Act. *McCarthy Construction Co.*, 355 NLRB 50, 52 (2010), adopted in 355 NLRB 365 (2010); *U.S. Reinforcing, Inc.*, 350 NLRB at 404.

1. Ownership

It is clear from the record that Lisa Bellavigna owned Ace in 2011, while Henry

Bellavigna (Lisa Bellavigna's father in law) owned Bella. (FOF, Section II(B)(1), E(1).) However, the fact that Ace and Bella had different owners does not preclude a finding that Ace

⁴³ At a bare minimum, Bob Bellavigna had apparent authority to act on behalf of Ace and Bella, given the evidence showing the significant extent that Lisa Bellavigna allowed him to represent Ace's interests in various settings, and the significant extent that Henry Bellavigna allowed him to take the leading role in starting up Bella's projects. (FOF, Section II(B)(2), (E)(2), (G)(2), (3), (5) and (7); see also *Comau, Inc.*, 358 NLRB No. 73, slip op. at 3 (2012) (explaining that the Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management).)

The Board has found an alter ego relationship in the absence of common ownership where both companies were either wholly owned by members of the same family or nearly entirely owned by the same individual, or where the older company maintained substantial control over the new company. *El Vocero de Puerto Rico, Inc.*, 357 NLRB No. 133, slip op. at 1 fn. 3 (2011); *ADF, Inc.*, 355 NLRB 81, 81 fn. 3 (2010), adopted in 355 NLRB 351 (2010). The Board has stated, however, that absent those limited circumstances, the lack of substantially identical common ownership precludes a finding of alter ego status. *U.S. Reinforcing, Inc.*, 350 NLRB at 405 (citing *Superior Export Packing Co.*, 284 NLRB 1169, 1170 (1987), enfd. mem. sub nom. *Meadowlands Hy-Pro Industries v. NLRB*, 845 F.2d 1013 (3d Cir. 1988)).

and Bella were alter egos because the Board has found companies to be alter egos where both companies were wholly owned by members of the same family. Ace and Bella fall into that exception since Lisa and Henry Bellavigna's family relationship (daughter in law/father in law) is sufficiently close to satisfy the common ownership element, and is coupled with evidence that Lisa and Bob Bellavigna took a number of steps to help Henry Bellavigna start and operate Bella, including endorsing Bella for the Trinity Episcopal Church subcontract (as a company that could perform just like Ace), allowing access to Ace's equipment and business lot, and assigning Ace employees to work on projects that belonged to Bella. See *Walton Mirror Works*, 313 NLRB 1279, 1284 (1994) (common ownership established where the owners of the two companies alleged to be alter egos were brothers in law).

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2. Management

At Ace, Bob Bellavigna served as the project coordinator, while Henry Bellavigna served as Ace's chief estimator and senior project manager. Randy Bell, Derek Hager, Steven Rollins and Dick Tracy served as some of Ace's superintendents, while Melissa Blanchard served as Ace's office manager. (FOF, Section II(B).)

Once Bella was formed, all of those employees gradually joined to Bella and assumed virtually identical positions in management. Henry Bellavigna was Bella's owner, but retained his role as chief estimator and senior project manager. Bob Bellavigna retained his role as project coordinator. Bell, Hager, Rollins and Tracy retained their roles as superintendents, and Blanchard retained her role as office manager. (FOF, Section II(E).)

To be sure, there were some differences between Ace's and Bella's management. Lisa Bellavigna owned Ace, but did not take a position at Bella. In addition, Robert A. Bellavigna moved from being a mason at Ace to being a project coordinator, project manager and vice president safety coordinator at Bella. (FOF, Section II(E)(4).) Those differences, however, are outweighed by the fact that Ace's key managers for masonry projects all joined Bella shortly after it began operations in fall 2011.

3. Supervision

Ace and Bella relied on much of the same personnel for supervision. At both Ace and Bella, the owner generally supervised the office employees, and relied on office manager Melissa Blanchard to serve as the owner's right hand person in the office. Both Ace and Bella relied on the project coordinator Bob Bellavigna to supervise the field employees. (FOF, Section II(B)(1), (2), (4), (5); II(E).) Bob Bellavigna in turn relied on masonry superintendents Randy Bell, Derek Hager, Steven Rollins and Dick Tracy to supervise field employees at Ace and Bella on their assigned projects. (FOF, Section II(B)(2), (4); II(E)(2), (4).)

4. Business purpose

Ace started out as a masonry contractor based in central New York, but expanded its purpose in 2006 when it began handling projects as a general contractor as well. Notwithstanding that change, however, Ace still continued to handle projects as a masonry contractor, and still limited its direct field employees to bricklayers, laborers and carpenters.

When other skilled labor was necessary for a particular project (i.e., labor that could not be handled by bricklayers, laborers or carpenters), Ace relied on subcontractors to provide that skilled labor. (FOF, Section II(A)(1).)

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When Bella began operations in 2011, it also started out as a masonry contractor based in central New York. Bella, however, did not expand its purpose to include work as a general contractor. Consistent with its focus on masonry contracting work, Bella's limited its direct field employees to bricklayers, laborers and carpenters. (FOF, Section II(D), (E)(1), (4).)

5. Operations

There is no dispute that Ace's office was located in Ithaca, New York, or that Bella's office was located at Henry Bellavigna's home in Burdett, New York. (FOF, Section II(A)(1), (E)(1).) Both Ace and Bella, however, used Ace's office as the meeting point when employees would receive new assignments and/or prepare to travel to their assigned worksites. By using Ace's office in that fashion, employees working on Bella projects could park their personal vehicles at Ace, and could readily use Ace vehicles to travel to and from Bella worksites. (FOF, Section II(G)(3), (5), (7).)

In addition to using Ace's office as a meeting point, Bella frequently used Ace employees to staff Bella projects. Specifically, while Bob Bellavigna remained at Ace in October and November 2011, he periodically directed Ace employees to work on projects that (often unbeknownst to the employee) belonged to Bella. Since Bob Bellavigna assigned work for Ace as part of his normal responsibilities, and used Ace's office space when making assignments, Ace employees who were assigned to Bella projects did not suspect that anything was unusual about their assignments until they later received paychecks issued by Bella instead of Ace for their work on certain projects. (FOF, Section II(G)(2), (4), (5).)

By late November 2011, Bella did hire a handful of new employees that did not have prior ties to Ace. However, Bella's core staff was composed of former Ace employees who assumed similar positions at Bella. (FOF, Section II(E)(4).)

6. Customers

As previously noted, between September 2011 and June 2012, Bella handled nine projects. In four of those nine projects, Bella essentially replaced Ace as the masonry contractor on the project, either by explicit agreement with Ace (Trinity Episcopal Church and SUNY Binghamton) or by stepping in to handle a project that once belonged to Ace (Vestal Hills and Ithaca Town Hall). In a fifth project, Bella secured a contract to perform work at Cornell University, but reached an agreement to have Ace perform the work because the contract needed to be handled by a union contractor. (FOF, Section II(G).)

Taken together, the evidence discussed above demonstrates that Ace and Bella did not merely have substantially identical customers – instead, Ace and Bella had identical customers <u>and</u> identical projects in several instances where Bella stepped in to take over for Ace (or vice versa).

7. Equipment

The evidentiary record shows that Bella regularly used Ace equipment when working on Bella projects in fall 2011. Employees assigned to Bella projects often traveled to and from the worksite in Ace vehicles. Ace equipment was regularly used at Bella worksites, well beyond any equipment that might have been covered by the equipment rental agreement that the parties produced at trial (which applied to a limited set of equipment for the Vestal Hills job, and not to any other Bella projects where Ace equipment was used). (FOF, Section II(G).)

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Bella also made liberal use of material from Ace's website. Specifically, Bella used Ace's client list, references, project photographs and employee biographies on its website, and also used a letter from the president that Ace distributed to describe its company and the services that it offered. (FOF, Section II(D).) Finally, Bella used the same software as Ace to take care of its payroll, and used the same telephone phone numbers that employees used when they were at Ace. (FOF, Section II(D), (E)(3).)

8. Purpose behind the creation of Bella (the alleged alter ego)

Although this factor is not an essential part of the Acting General Counsel's case that Bella is Ace's alter ego, the Acting General Counsel maintains that Bella was founded because Ace wished to break away from the constraints associated with being a union contractor. As previously noted, Bob Bellavigna did tell union officials that Ace had trouble competing with non-union contractors for business, and expressed the hope that Bella would enable him to get out of the financial hole that he was in due to Ace's financial troubles. (FOF, Section II(H).) In addition, Henry Bellavigna expressed some hesitation with going union in November 2011. Perhaps most important, however, is the evidence in the record about how Henry Bellavigna handled fringe benefits when Bella employees worked on projects where such benefits were required under one of the applicable collective-bargaining agreements. Rather than simply sending benefit payments directly to the union benefit funds (and thus implicitly accepting obligations that apply to union contractors that signed collective-bargaining agreements with the Bricklayers, Laborers and Carpenters), Henry Bellavigna devised a work-around and paid Bella employees the monetary amount of any fringe benefits directly. (FOF, Section II(E)(4).) As a result of that work-around, Bella was able to take on union contractor jobs obtained from Ace while retaining its own status as a nonunion contractor. In light of that evidence, I find that Bella was created, at least in part, 45 to evade Ace's obligations under the Act.

⁴⁵ To be sure, Bella was created for other reasons in addition to evading responsibilities under the Act. By fall 2011, Ace was a sinking ship, as it owed money to the bank and to the Unions, and was struggling financially due to the poor economy and a string of money-losing deals. In addition, Lisa Bellavigna was unequivocal in her desire to get out of the contracting industry. (FOF, Section II(C), (F).) Those circumstances also led to the creation of Bella, essentially as a lifeboat that could be used to salvage viable work from Ace before Ace went under (due to poor finances and/or Lisa Bellavigna finally deciding to leave the construction industry). The presence of these alternate (and arguably lawful) motivations does not change the outcome, however, because the Board has made it clear that "the fact that there were additional legitimate motives for management's actions does not lessen the significance of the strong antiunion component underlying those acts." *A.D. Conner, Inc.*, 357 NLRB No. 154, slip op. at 18 (2011).

9. Analysis of all factors

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Viewing all of the factors as a whole, I find that the Acting General Counsel demonstrated that Ace and Bella are alter egos. Ace and Bella have substantially identical ownership based on the close family relationship between Lisa and Henry Bellavigna, the owners of the two companies. Bella established itself as a masonry contractor (just as Ace had been), and hired virtually all of Ace's key managers and supervisors that Ace used for its masonry projects. Bella made liberal use of Ace's employees, Ithaca facility, masonry equipment and website when it began operating, and stepped in for Ace on multiple ongoing projects. And last, Bella made a point of setting itself up as a nonunion contractor and avoiding obligations under the collective-bargaining agreements (such as paying fringe benefits to the union benefit funds) even though it was handling projects where the collective-bargaining agreements applied. In short, all of the relevant factors support a finding that Ace and Bella are alter egos. See *E.L.C. Electric, Inc.*, 359 NLRB No. 20, slip op. at 9 (2012) (finding that companies were alter egos was supported by evidence that the new company: hired the old company's employees, performed work that was a continuation of the old company's work; and operated out of the same warehouse and used some of the same vehicles and equipment as the old company). Action of the same vehicles and equipment as the old company.

Since Bella is Ace's alter ego, Bella is obligated to comply with the terms of the collective-bargaining agreements that Ace entered into with the Bricklayers, Laborers and Carpenters. There is no dispute that since its formation on September 21, 2011, Bella failed and refused to apply the terms and conditions of those collective-bargaining agreements (including the contractual and fringe benefit provisions therein, which are mandatory subjects of bargaining), and did so without the Unions' consent. Accordingly, Bella, and Ace, as its alter ego, violated Section 8(a)(5) and (1) of the Act by failing and refusing to apply the terms of the collective-bargaining agreements that Ace entered into with the Bricklayers, Laborers and Carpenters, and by failing and refusing to bargain collectively with the Bricklayers, Laborers and Carpenters as the exclusive collective-bargaining representatives of Ace and Bella's bargaining unit employees.⁴⁸

⁴⁶ I have not considered the Carpenters' argument that in the alternative to being alter egos, Ace and Bella are a single employer. (See Carpenters' Posttrial Br. at 3–5.) The Board has recognized that "alter ego" and "single employer" are related, but separate, concepts. *A.D. Conner, Inc.*, 357 NLRB No. 154, slip op. at 18 (2011). In this case, the Acting General Counsel raised only the alter ego theory in its complaint. Since the complaint was never amended to allege that Ace and Bella are a single employer, and since the issue of single employer status was not fully litigated during the trial, I decline to consider that as an alternate theory. See *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, slip op. at 2 & fn.4 (2012) (Board declined to find a violation that was not alleged in the complaint and was not fully litigated). In any event, the point is moot since I have determined that Ace and Bella indeed are alter egos.

to support their argument that Ace and Bella are not alter egos. In *First Class Maintenance*, the Board held that the son's cleaning company was not the alter ego of his parents' company because the son managed and supervised the new company independently, and because the son's company was not dependent on or subject to the control of his parents' company. Id. at 485–486. Here, by contrast, Bella was dependent on Ace for management and supervision, and relied on Ace (through Lisa and Bob Bellavigna) to supply Bella with manpower, equipment and new projects (among other things).

⁴⁸ In this connection, I note that there is no merit to the Respondents' contentions that Bella did not

D. Did Ace Masonry and Bella Masonry Violate the Act by Refusing or Failing to Respond to the Bricklayers' and Laborers' Information Requests?

1. Applicable legal standard

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An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant, and thus relevance must be shown. *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011). The burden to show relevance is not exceptionally heavy, as the Board uses a broad, discovery-type standard in determining relevance in information requests. Id.; *Bentley-Jost Electric Corp.*, 283 NLRB 564, 567 (1987).

When a union requests information pertaining to a suspected alter ego relationship, the union must establish the relevance of the requested information. A union cannot meet its burden based on a mere suspicion that an alter ego relationship exists; it must have an objective, factual basis for believing that the relationship exists. Under Board law, the union is not obligated to disclose those facts to the employer at the time of the information request; neither is the union obligated to show that the information which triggered its request was accurate or even ultimately reliable. Rather, the Acting General Counsel need only demonstrate that at the time of the request, the union had a reasonable belief based on objective evidence that an alter ego relationship exists. *McCarthy Construction Co.*, 355 NLRB at 52; see also *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, slip op. at 1, 14 (2012).

In this case, the Bricklayers and Laborers did have an objective, factual basis for believing that Ace and Bella had an alter ego relationship when they made their information requests in January and February 2012. By that point, union representatives had: observed Bella's website and its references to Ace employees and clientele; observed Bella employees using Ace equipment at the Vestal Hills project; and heard Bob Bellavigna state in a meeting that Ace had trouble competing with non-union contractors for residential jobs, and that he hoped Bella could help him escape the financial hole he was in. The Bricklayers' and Laborers' information requests were therefore relevant to their roles as exclusive collective-bargaining representatives for their respective bargaining units at Ace/Bella.⁴⁹

refuse to bargain, and that no employee rights were violated. (R. Posttrial Br. at 16–17.) To the contrary, Bella violated the rights of its bargaining unit employees when it failed and refused to pay bargaining unit employees the contractual and fringe benefits specified in the applicable collective-bargaining agreements. Bella's refusal to honor its obligations under the collective-bargaining agreements was indeed a refusal to bargain that violated the Act as specified above.

⁴⁹ The Bricklayers' and Laborers' informed administration of their collective-bargaining agreements, including protection and preservation of unit work (a mandatory subject of bargaining), is one of their statutory duties as the exclusive collective-bargaining representatives of the employees in their respective bargaining units. *Bentley-Jost Electric Corp.*, 283 NLRB at 567.

Upon receiving the information request, Bella unequivocally stated through counsel that it would not be providing responsive information to the Bricklayers and Laborers. It is also undisputed that neither Ace nor Bella provided the information that the Bricklayers and Laborers sought in their information requests. By failing and refusing to provide the Bricklayers and Laborers with the requested information, Ace and Bella failed and refused to bargain collectively with the Bricklayers and Laborers in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. At all material times, Bob Bellavigna has been a supervisor for Ace and Bella within the meaning of Section 2(11) of the Act.

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- 2. Since September 21, 2011, Ace and Bella have been alter egos of each other within the meaning of the Act and are jointly and severally liable for the unfair labor practices found in this case.
- 3. By failing and refusing to apply the terms of the collective-bargaining agreements that its alter ego Ace entered into with the Bricklayers, Laborers and Carpenters since September 21, 2011, and by failing and refusing to bargain collectively with the Bricklayers, Laborers and Carpenters as the exclusive collective-bargaining representatives of its employees, Bella violated Section 8(a)(5) and (1) of the Act.
- 4. By failing and refusing to provide the Bricklayers and Laborers information necessary for them to perform their duties as the exclusive collective-bargaining representatives of their respective bargaining units, namely, information in response to the January 13 and February 14, 2012 letters seeking information relevant to whether Bella was a disguised continuance, or alter ego, of Ace, Respondents Ace and Bella violated Section 8(a)(5) and (1) of the Act.
- 5. By committing the unfair labor practices stated in Conclusions of Law 3 and 4 above, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

- Having found that Respondents Ace and Bella have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.
- Ace and Bella, having unlawfully failed to apply the terms and conditions of employment set forth in the collective-bargaining agreements for its employees in the Bricklayers, Laborers and Carpenters bargaining units, must make those employees whole for any loss of earnings or other benefits, computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, Respondents shall be ordered to make whole employees for any expenses resulting from the failure to make contributions to the benefits funds provided for in the collective-bargaining agreements, plus interest, and to reimburse those benefits funds for

those contributions they have failed to make on behalf of bargaining unit employees. Such payments shall be computed in the manner described in *Kraft Heating & Plumbing*, 252 NLRB 891, fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), and *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979).⁵⁰

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I shall also order Ace and Bella to provide the information requested by the Bricklayers and Laborers in the questionnaire attached to the January 13 and February 14, 2012 letters requesting information from Ace and Bella.

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Finally, since both Ace and Bella both ceased operations by the time this matter went to trial, I shall order Ace and Bella to mail the notice in this matter to the former employees who worked for Ace and Bella from the time that the unfair labor practices were committed until the date of this decision.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵¹

ORDER

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The Respondents, Ace Masonry, d/b/a Ace Unlimited, Ithaca, New York, and Bella Masonry, LLC, Burdett, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Failing and refusing to apply the terms of the collective-bargaining agreements that Ace entered into with the Bricklayers, Laborers and Carpenters, and failing and refusing to bargain collectively with the Bricklayers, Laborers and Carpenters as the exclusive collective-bargaining representatives of the employees in their bargaining units.

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(b) Failing and refusing to provide the Bricklayers and Laborers information necessary for them to perform their duties as the exclusive collective-bargaining representatives of their respective bargaining units, namely, information in response to the January 13 and February 14, 2012 letters seeking information relevant to whether Bella was a disguised continuance, or alter ego, of Ace.

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I decline the Acting General Counsel's request that, as part of the remedy, I require the Respondent to reimburse employees for the amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no unfair labor practices. I also decline the Acting General Counsel's request that I require the Respondent to submit the appropriate documentation to the Social Security Administration so that when any backpay is paid, it will be allocated to the appropriate periods. These remedies would constitute changes in Board law, and thus the Acting General Counsel should present its requests to the Board directly. See *New Link, Ltd.*, 358 NLRB No. 26, slip op. at 4 fn. 2 (2012).

⁵¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Make whole all bargaining unit members for the Bricklayers, Laborers and Carpenters for any loss of earnings and other benefits suffered as a result of unfair labor practices stated in this decision, in the manner set forth in the remedy section of this decision.

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(b) Comply with all terms and conditions of the collective-bargaining agreements that the Respondents entered into with the Bricklayers, Laborers and Carpenters.

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(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(d) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,⁵² at their own expense, to all employees in the Bricklayers, Laborers or Carpenters bargaining units who were employed by the Respondents at any time from the onset of the unfair labor practices found in this case until the date of this decision. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondents' authorized representatives.

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

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IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, DC December 12, 2012

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Geoffrey Carter
Administrative Law Judge

⁵² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to apply the terms of the collective-bargaining agreements that Ace entered into with the Bricklayers, Laborers and Carpenters, or fail and refuse to bargain collectively with the Bricklayers, Laborers and Carpenters as the exclusive collective-bargaining representatives of the employees in their bargaining units.

WE WILL NOT fail and refuse to provide the Bricklayers and Laborers information necessary for them to perform their duties as the exclusive collective-bargaining representatives of their respective bargaining units, namely, information in response to the January 13 and February 14, 2012 letters seeking information relevant to whether Bella Masonry, LLC was a disguised continuance, or alter ego, of Ace Masonry, d/b/a Ace Unlimited.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all bargaining unit members for the Bricklayers, Laborers and Carpenters for any loss of earnings and other benefits suffered as a result of our failure and refusal to: apply the terms of the collective-bargaining agreements that Ace entered into with the Bricklayers, Laborers and Carpenters; and bargain collectively with the Bricklayers, Laborers and Carpenters as the exclusive collective-bargaining representatives of the employees in their bargaining units.

WE WILL comply with all terms and conditions of the collective-bargaining agreements that the Respondents entered into with the Bricklayers, Laborers and Carpenters.

ACE MASONRY, D/B/A ACE UNLIMITED	

		(Representative)	(Title)	
		BELLA MASONRY, LLC		
		(Employe	er)	
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.